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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

LOU POLLER, *Petitioner,* v. COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, and H. K. AKERBERG, *Respondents.*	No. 45

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS

Questions Presented

1. Whether the owner of a television station in a multi-station market was injured in his business or property by reason of any violation of the Sherman Act when the network which had been supplying programs to his station under an affiliation agreement terminated that agreement, in accordance with its terms, because it acquired its own station in that market.

2. Whether summary judgment dismissing petitioner's complaint was properly granted.

Statement

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a dissolved Wisconsin corporation of which he was president. Respondent Columbia Broadcasting System, Inc. ("CBS"), among other things, owns television stations and operates one of three national television networks. CBS Television is an unincorporated division through which CBS conducts its television operations; it was named as a defendant but did not appear because it is not a legal entity capable of being sued. Respondent J. L. Van Volkenburg was an officer, and respondent H. K. Akerberg an employee, of CBS.

Initially, all television broadcasting stations in the United States operated on Channels 2 to 13, the very-high frequency ("VHF") wave lengths (R 13). In June 1952, after a long freeze on the issuance of licenses for new stations (R 205, 235-6), the Federal Communications Commission ("FCC") opened additional channels (14 to 82) in the ultra-high frequency ("UHF") wave lengths (R 13). At that time, few, if any, receivers in the hands of the public were equipped to receive UHF signals (R 13), and the new UHF stations faced great difficulty in competing with VHF stations in the same markets (R 14, 155). Three of the new UHF channels were allocated to Milwaukee (R 14).

Midwest applied for a license to operate on one of the UHF channels, and was granted a construction permit in February 1953 (R 15, 235). Its station, WCAN-TV, began broadcasting in September 1953 (R 15). Shortly thereafter, another UHF station, that of Bartell Broadcasters, Inc. ("Bartell"), WOKY, also went on the air (R 16). At that time, there was one other station in the market, WTMJ, a "pre-freeze" VHF station which had a primary NBC affiliation (R 14). Competing applications

were then pending for a second VHF station (R 16), and in January 1954 the Commission added a third VHF channel to a Milwaukee suburb (R 16).

After starting construction of his station, petitioner approached all three networks (R 93) for an affiliation agreement under which that station would obtain national network programs for broadcast in Milwaukee. In August 1953, when Midwest was about to commence operation of the station, it entered into an affiliation agreement with CBS (R 57-60). That agreement contained a clause, modifying the general form, which permitted CBS to terminate it at any time on six months' notice (R 59). That clause was intended to indicate to the affiliate that the relationship was a trial (R 159, 161, 183), and it was so understood by petitioner (R 95, 99).

Petitioner testified (R 94) that he asked CBS "continuously" to eliminate the six-month termination clause and "never stopped asking"; and that he "bombarded" the CBS representatives with material. He stated that "It wasn't so much the letter of the law as the acknowledgement that you were there to remain as an affiliate" (R 95), that he never got that acknowledgement (R 95), and that he used the CBS insignia with "trepidation" (R 99).

Under the FCC's multiple ownership rule in effect in 1953,* a single licensee was not permitted to own more than five television broadcasting stations. In December 1953, the FCC issued a notice of proposed rule-making looking toward the amendment of its rule to permit single ownership of seven stations, of which no more than five could be VHF stations (R 50). CBS had long championed UHF television (R 205). It filed a statement with the Commission supporting the proposed amendment (R 50, 252-7).

*Regulations, § 3.636(a).

Anticipating the adoption of that proposed rule, CBS undertook in July 1954 to put itself in a position to acquire a UHF station in Milwaukee (R 50). CBS had heard from a number of different sources that petitioner had been trying to sell his station at a price in excess of $2,000,000 (R 152, 163, 179). CBS considered that to be substantially more than the property was worth (R 152, 163) and "completely out of line" (R 184). CBS' president thought that this was more than just puffing because of inquiries which he had received from financial people who came to see him about getting a regular two-year affiliation agreement in the event of a sale of the station (R 163-5). He testified: "I was even offered a piece of the station under the table if I would cause it to have a 2-year contract by a man that Mr. Poller had gone to" (R 165, 179).

In this situation, CBS chose not to undertake negotiations with petitioner (R 184). CBS thought that it could buy the other UHF station in Milwaukee, WOKY, owned by Bartell, at a reasonable price (R 32, 152). It arranged to have defendant Holt go to Milwaukee to negotiate for an assignable option to purchase that station (R 91). Holt obtained such an option without disclosing that he was acting for CBS (R 50, 92). The price was $335,000, which was $50,000 more than Bartell had invested in the station (R 131-2).

The amendment to the FCC rule permitting the ownership by a single person of two UHF, in addition to five VHF, stations became effective October 22, 1954. At that time, Holt assigned his option to CBS and it was exercised (R 89, 92). Bartell had no knowledge prior to the assignment that CBS was the prospective purchaser (R 90, 92).

On October 21, 1954, CBS gave Midwest a six-month notice of the termination of its affiliation agreement (R 50). The following day, petitioner went to New York and met with representatives of CBS. He complained of the termi-

nation and stated that he had gone to great expense for a new studio and equipment which was far more elaborate than that which would be required for the operation of a station which did not have a CBS affiliation (R 50, 198). After further conversations and negotiations, an agreement was reached (R 61-84) under which CBS acquired the studio and equipment of Midwest, paid that company $500,000, and transferred to it the equipment which CBS had acquired from Bartell. The agreement contained a recital that Midwest intended to continue the operation of its station (R 61). Petitioner acknowledged that CBS assumed liability for the work in progress and that he was reimbursed in full for the sums which he had spent on the studio (R 105).

Both the Bartell option and the agreement between CBS and Midwest were conditioned on approval by the FCC of the assignment of the Bartell license to CBS. Such approval was granted on January 14, 1955. At the same time, the FCC granted an application by Midwest for modification of its permit to allow the removal of its main studio to the location previously used by Bartell (R 51-2). 11 Pike & Fischer RR 913.

CBS commenced operation of the Milwaukee station under changed call letters WXIX-TV on February 17, 1955. At that time, there were two VHF stations in the market (R 241-2). One of them was WTMJ, the primary NBC affiliate (R 160, 238), which was "a giant" (R 155). The second had commenced operation in October 1954 with a primary ABC affiliation (R 17). Later, a third VHF station went on the air in Milwaukee, and CBS operated the only UHF station in the country that was in competition with three VHF stations in the same market (R 209). It continued such operation until March 31, 1959 (R 272), when it finally succumbed to the VHF competition.

At the time it contracted for the Milwaukee station, CBS owned three television stations out of a total of 386

that were then on the air (R 52). It had affiliation agreements giving it option time on 127 stations, less than one-third of the total number on the air (R 52). During the year 1954, CBS' share of the aggregate time sales to national and regional advertisers represented 23.3% of the industry total of such sales (R 86).

Television advertising is of three types: network, national spot and local. Network advertising is placed by national advertisers with network organizations; national spot advertising is placed by such advertisers directly with individual stations (R 85). Of the 50 largest CBS television network customers in 1955, 78% also used national spot advertising and 50% were included in the 100 largest national spot advertisers (R 54). During the same year, of the 50 largest CBS television network customers, 76% also advertised on at least one other television network, and 58% were among the 50 largest customers of at least one other television network (R 54).

Petitioner's own statements reflect the inherent difficulties which confronted all UHF stations faced with VHF competition. His complaint (R 13-14) refers to the fact that initially all television broadcasting was in the VHF band; and that when, in June 1952, the FCC authorized the use of UHF channels, "the success of UHF stations was extremely problematical". Petitioner's opposing affidavit (R 247-8) refers to the fact that the number of UHF stations in the country decreased from 121 in December 1953 to 84 in November 1958.

The complaint also alleges (R 14) that "at no time material to this action could a UHF television station remain in existence at Milwaukee without the advantage of an affiliation with CBS, NBC or ABC".

This action was commenced in September 1956, eighteen months after the transaction between CBS and petitioner's

company was concluded. The complaint (R 6-23) charges that petitioner was driven out of the broadcasting business in Milwaukee by a conspiracy to restrain trade in violation of Section 1, and by monopolization and attempted monopolization in violation of Section 2, of the Sherman Act.

Respondents' motion for summary judgment (R 46) was made after depositions had been taken and interrogatories answered. Thereafter, petitioner took further depositions for use in opposition to the motion.

The District Court granted respondents' motion for summary judgment (R 282-6). The Court of Appeals affirmed, with one judge dissenting (R 290-307).

Summary of Argument

1. Petitioner entered into an affiliation agreement which was terminable by CBS on six months' notice. He did so with full knowledge that its continuance was uncertain. Yet the sole injury for which he seeks redress is the alleged loss of the value of his business as a going concern, which, on his own statement, depended on the continuance of that affiliation. The only issue in the case is whether the cancellation of the affiliation agreement, in accordance with its terms, by reason of CBS' purchase of a competing station violated the antitrust laws.

Petitioner seeks to confuse that single issue by discussion of conditions in the television industry which have no relevance here. CBS did not exert any "leverage" of its alleged network power in dealing with petitioner. In the Milwaukee market, where petitioner's business was conducted, CBS was far from dominant. And its only activity that caused the claimed injury to petitioner was that of a program supplier seeking to present its own programs under highly competitive conditions.

The fact that, after cancelling the affiliation, CBS bought petitioner's equipment adds nothing to his case.

Petitioner claims that trade was restrained in television broadcasting, not in equipment sales. On his own premise, the injury of which he complains was suffered as soon as the affiliation was cancelled; the subsequent property purchase, far from contributing to the injury, relieved him of liabilities and reimbursed him for what he had spent on his new studio.

Termination of the affiliation, the Court below properly held, was a legitimate exercise by CBS of its right, under *United States* v. *Colgate & Co.*, 250 U. S. 300, to discontinue furnishing its programs to petitioner.

2. The *Colgate* rule is not rendered inapplicable by the fact that CBS bought a station in the market and did not merely change affiliates,—a course which would concededly have been legal. The challenged transaction entailed no violation of the Sherman Act. It did not restrain trade or create monopoly.

Petitioner's claim is that the purchase by CBS of the Bartell station and of petitioner's equipment restrained trade by reducing from two to one the number of UHF stations in Milwaukee. That claim is irreconcilable with his allegation that an unaffiliated UHF station could not survive in Milwaukee or elsewhere. Bartell had no network affiliation, and on petitioner's assertion, could not have survived. Thus there would, in any event, have been only one UHF station in the market. This was not due to any action on the part of CBS.

The charges of monopolization and attempt to monopolize rest on the fallacious premise that "UHF in Milwaukee" is a separate market. This ignores the intense competition between UHF and VHF stations, to the decided disadvantage of the former. CBS eventually succumbed to that competition. It is the only alleged monopolist

to come before this Court after it had been driven out of business by the superior power of its competitors.

3. The fallacy in petitioner's claim that CBS used "leverage" power against him is shown by the authorities on which he relies. This case is wholly unlike *United States* v. *Radio Corporation of America,* 358 U. S. 334, where the complaint charged that NBC compelled Westinghouse to exchange its Philadelphia station for the NBC station in Cleveland by threatening to withhold NBC affiliation from Westinghouse not only in Philadelphia, but also in other cities. In later proceedings under the consent judgment in that case, the Department of Justice determined that the termination of the Westinghouse affiliation in Boston because of NBC's purchase of another station in that market—a situation identical with the present one—would not violate the statute.

The other cases cited by petitioner, unlike this case, all entailed a tie-in arrangement or a use of monopoly power to force a desired course of dealing. There was here no monopoly and no tie-in, but only the unilateral exercise of CBS' rights as a program supplier in a competitive market.

4. There is no merit in petitioner's effort to avoid the *Colgate* rule on the ground that the ownership of stations by a network is a *per se* violation of the Sherman Act. That claim is refuted by the very authorities on which petitioner relies. The affirmative showing that there was no restraint of trade and no monopolization in Milwaukee requires the dimissal of his complaint. In asserting that network ownership of stations imposes restraints on other program suppliers and advertisers, petitioner seeks to raise issues which are not germane to this private action.

The question of legislative policy which petitioner raises is one for the Congress or the Commission, and not for this Court. It is a question which has long been before the FCC.

That agency has repeatedly sanctioned network ownership of stations as a matter of policy. The Court below properly held that much weight should be given to its expert judgment that such ownership does not violate the statute.

5. Petitioner's claim under Section 1 must be rejected on the further ground that, as a matter of law, the essential element of a conspiracy was lacking. CBS Television is the unincorporated division of the corporation through which all of its television operations are conducted. It is not a legal entity and not capable of being a conspirator. Neither Bartell nor Holt joined with CBS in such concerted action for a common purpose as is required to make them parties to a conspiracy. The naming of two CBS employees does not create a conspiracy charge since there were no other conspirators.

6. There is no triable issue of fact warranting the denial of summary judgment. Petitioner's efforts to create such issues rest on the erroneous legal premises which permeate his entire case. The fact of competition among the networks cannot be disputed on this record. Petitioner's efforts to impute questionable motives to CBS' representatives rest on surmise and suspicion and not on evidence. Even if they raised genuine issues of fact, those issues would not be determinative under either Section 1 or Section 2 of the Sherman Act.

I.

PETITIONER'S CLAIM OF INJURY RESTS SOLELY ON THE TERMINATION OF HIS NETWORK AFFILIATION, WHICH THE COURTS BELOW PROPERLY HELD TO BE PERMISSIBLE UNDER THE RULE OF *UNITED STATES* v. *COLGATE & CO.*, 250 U. S. 300.

Petitioner may maintain this private action only if he was "injured in his business or property by reason of any-

thing forbidden in the antitrust laws." At the outset, it is necessary to identify his claim of injury and the act by which it was caused. When this is done, it becomes apparent that petitioner's alleged injury was caused solely by a unilateral termination of dealings which did not violate the antitrust laws.

Petitioner engaged in broadcasting in Milwaukee. By its affiliation agreement with him, CBS agreed to supply to him its programs for broadcast in that city. Those programs competed with the programs of the other two networks, as well as those from other sources. Far from being dominant in Milwaukee, CBS was at a decided competitive disadvantage in that market. The programs of NBC were broadcast by the first station in the market, WTMJ, which was a VHF station and a "giant" (R 155).

Under the FCC's Chain Broadcasting Regulations (§ 3.658(c)), no affiliation agreement may continue for a period of more than two years. When it decided to supply its programs for broadcast over the technically inferior UHF outlet, CBS entered into an arrangement with petitioner which was a "trial" (R159), and was so understood by him. He testified (R 99) that he used the CBS insignia with "trepidation"; that in seeking to have the six-month termination clause eliminated from his contract, "It wasn't so much the letter of the law as the acknowledgement that you were there to remain as an affiliate" (R 95); and that he never did get that acknowledgement (R 95). Yet it is indisputable on this record that the injury for which he seeks redress was caused by the loss of that affiliation, and by nothing else.

Petitioner admitted (R 105) that, under the contract for the sale of his equipment (R 61-84), CBS reimbursed him for his expenditures on his new studio building and assumed liability for the work in progress on that build-

ing. His damage claim is predicated on the alleged difference between the sum of $500,000 which he received under that contract (plus $50,000 which is alleged to have been the value of the Bartell equipment that he received) and the "fair value" of his station, which he claims to have been $2,000,000 (R 22-3). That valuation is based on an offer allegedly received from George Storer (R 17, 97). Petitioner admitted, however, that Storer's interest was conditioned on the assumption that the station would have a CBS affiliation (R 97-100).* And his brief (p. 8) refers to the purchase of petitioner's equipment for a price "far less than" he "could have obtained for his going, successful station", *i.e.*, the station which had a CBS affiliation.

Petitioner's brief does not take issue with the statement in the opinion below that (R 294):

> "Poller admits that the large value he placed on the Midwest station—greatly in excess of its cost—depended upon a CBS affiliation not subject to cancellation on six months' notice."

It is plain that the claim of injury to "business or property" in this case is a claim for the loss of something which petitioner did not have. The act of CBS which caused that claimed loss was the act of terminating the affiliation agreement, and the only issue in the case is whether that termination was legal.

Petitioner seeks to obscure this single issue by a discussion of numerous aspects of the broadcasting industry which are wholly unrelated to his claim of injury. His brief (p. 13) purports to recognize that the "must buy" and

*This is confirmed in petitioner's brief. While the complaint alleges (R 19) that CBS persuaded Storer to discontinue negotiations with petitioner's station, the brief (p. 4) shows that allegation to amount only to the charge that CBS refused to give Storer "assurance that the CBS affiliation would be continued".

"option time" practices, which are claimed to be illegal, "do not, of course, by their mere existence confer a cause of action on petitioner". It describes those practices as means to "the acquisition of additional power beyond that which is inherent in the nature of the network itself". Unless such "additional power" was exerted against petitioner, those practices are wholly unrelated to his claim of injury and have no bearing on this private action.*

It is plain that such alleged power was not exerted in any way in the transaction by which petitioner claims to have been injured.** CBS conducted no negotiations with petitioner before cancelling the affiliation. Indeed, one of his grievances, as the Court below noted (R 295), is that CBS dealt with Bartell instead of negotiating with him for the purchase of his station. In terminating the affiliation agreement, CBS simply exercised its right as a program supplier to discontinue the use of petitioner's station as an outlet for its programs; it exerted no pressure derived from any other facet of its operations.

In choosing to purchase the Bartell station, CBS certainly did not use the alleged network "leverage". On the contrary, far from applying any pressure, it successfully concealed its identity as the purchaser. The very fact that a "dummy" was used disproves petitioner's assertion (p. 24) that CBS used its "leverage power as a network to enter into the business of operating a local TV station".

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*_Fifth & Walnut, Inc._ v. _Loew's, Incorporated_, 176 F. 2d 587, 590 (2d Cir.), cert den. 338 U. S. 894; _Conference of Studio Unions_ v. _Loew's Inc._, 193 F. 2d 51, cert. den. 342 U. S. 919; _Wolfe_ v. _National Lead Co._, 225 F. 2d 427 (9th Cir.), cert. den. 350 U. S. 915; _Hunter Douglas Corporation_ v. _Lando Products_, 235 F. 2d 631, 638 (9th Cir.); _Miller Motors, Inc._ v. _Ford Motor Co._, 252 F. 2d 441, 448 (4th Cir.); _Affiliated Music Enterprises_ v. _Sesac, Inc._, 268 F. 2d 13, 16 (2d Cir.), cert. den. 361 U. S. 831.

**For this reason, there is no occasion to answer petitioner's contention that "must buy" and "option time" violated the statute. We do not concede the illegality of either of those practices; they present issues which obviously cannot be decided on this record.

Petitioner asserts, however, that "leverage" was used "to grind down his price". That assertion is both erroneous and irrelevant. CBS did not buy petitioner's station, but his equipment. That purchase, it is conceded (R 21, 105), relieved him of substantial obligations and reimbursed him in full for what he had spent on his studio. His complaint is not that he received too little for the equipment which was sold, but that he did not receive what he claims to have been the "fair value" of the station as a going concern.

Petitioner's brief (p. 37) admits that he "importuned CBS to take the equipment off his hands". That importuning occurred after CBS had committed itself to the purchase of the Bartell station and had given petitioner notice of termination. The brief (p. 26) declares that:

> "The economic fact is that CBS eliminated Poller the moment it bought Bartell. . . ".

The equipment purchase, it is plain, contributed in no way to the fact that petitioner could not continue in business. In exchange, he received the equipment with which Bartell had been operating. The purchase of the Bartell station, which is claimed to have "eliminated" petitioner, was what necessarily led to the cancellation of his affiliation. The injury allegedly caused by that cancellation, and not any grievance he might have in connection with the equipment purchase, is the sole basis for his claim to treble damages under the Sherman Act. Cf. *Bookout* v. *Schine Chain Theatres,* 253 F. 2d 292 (2d Cir.); *Peter* v. *Western Newspaper Union,* 200 F. 2d 867, 872 (5th Cir.); *Peterson* v. *Borden Co.,* 50 F. 2d 644 (7th Cir.).

In short, petitioner cannot escape from the fact that, on his own premise, it was the refusal of CBS to continue supplying him with its programs, and that alone, which caused the alleged injury on which this action is based.

Unless the termination of his affiliation agreement because CBS was entering the local market was unlawful, petitioner was not injured in his business or property "by reason of anything forbidden in the antitrust laws."

In recognizing that this was the business situation, the Court below adopted no new antitrust doctrine. There is no basis for petitioner's assertions (p. 23) that the Court thought that a violation of the statute was excused by "a kind of contributory negligence" or "a kind of doctrine of estoppel by contract". The opinion noted the indisputable fact that petitioner's "real complaint is that CBS would not eliminate the six months' cancellation clause from his affiliation agreement" (R 296). It held that the cancellation of the agreement in accordance with that clause, on which petitioner's claim of injury is based, constituted the unilateral exercise of CBS' right to select the outlet for its own programs in the Milwaukee market. *United States* v. *Colgate & Co.*, 250 U. S. 300.

The *Colgate* rule has been applied, as the Court below noted (R 296), to the termination of network affiliation agreements. *Federal Broadcasting System, Inc.* v. *American Broadcasting Co.*, 167 F. 2d 349 (2d Cir.), cert. den. 335 U. S. 821. Numerous decisions of the Courts of Appeals have applied it to claims clearly analogous to the present one arising out of the termination of exclusive dealership arrangements.* And this Court recently reaffirmed the applicability of the *Colgate* decision to "a case of a single

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Packard Motor Car Co. v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. den. 355 U. S. 822; *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), aff'd on opinion below, 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (5th Cir.), cert den. 348 U. S. 821; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925.

trader refusing to deal with another". *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, 212. This is such a case.

Both Courts below recognized (R 284, 296), of course, that the *Colgate* rule is not absolute. However, there is no occasion to consider here the cases, culminating in *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, referred to by petitioner (p. 23), which involved efforts to control resale prices. See *Associated Beverages Co.* v. *Ballantine & Sons*, 287 F. 2d 261, 265 (5th Cir.) The only limitation here pertinent is that which was stated by this Court, with the citation of numerous authorities, in *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 625:

> ". . . Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, . . . different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though 'neither absolute nor exempt from regulation.' *Lorain Journal* v. *United States*, 342 U. S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. . . ."

We turn now to a showing (Point II) that the termination of dealings which alone caused petitioner's injury was not rendered unlawful by the fact that it was occasioned by CBS' acquisition of its own station, since there was no restraint of trade and no monopolization. We shall then consider petitioner's efforts to avoid the *Colgate* rule by mistaken reliance on cases dealing with the use of "leverage" power (Point III), and by advocating a rule of *per se* illegality that is contrary to this Court's decisions on vertical integration (Point IV).

II.

THE TERMINATION OF PETITIONER'S AFFILIATION TO ENABLE CBS TO CARRY ITS OWN PROGRAMS OVER THE STATION WHICH IT ACQUIRED DID NOT RESTRAIN TRADE IN VIOLATION OF SECTION 1 AND WAS NOT MONOPOLIZATION OR AN ATTEMPT TO MONOPOLIZE IN VIOLATION OF SECTION 2.

In considering petitioner's claim, it is necessary to distinguish, as petitioner does not, between the two sections of the statute which he has invoked.

A. THERE WAS NO RESTRAINT OF TRADE IN VIOLATION OF SECTION 1.

The charge that a restraint of competition was effected because the number of stations in Milwaukee was reduced is refuted by petitioner's own allegations. His complaint alleges (R 13) that:

> "There was and is no place in the United States where an unaffiliated UHF station could or can operate and survive in competition with stations owned by or having affiliation with a national network."

Specifically with reference to Milwaukee, it alleges (R 14) that ". . . at no time material to this action could a UHF television station remain in existence at Milwaukee without the advantage of an affiliation with CBS, NBC or ABC". His attempt to fasten responsibility on CBS for the reduction from two to one in the number of UHF stations in Milwaukee cannot be reconciled with those allegations.

While plaintiff operated his station, he had a CBS affiliation, and the other two networks were affiliated with the technically superior VHF stations in the market. On his own allegations, had the situation remained unchanged, Bartell, who had no affiliation, could not have continued to operate. This was recognized by the dissenting Judge below (R 303-4). No restraint under Section 1 can be estab-

lished by the claimed elimination of a station which, on petitioner's basic premise, could not have survived.*

> "If competition is doomed by market conditions, it cannot be 'lessened' by a change of ownership." *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F. 2d 582, 589 (1st Cir.) cert. den. 365 U. S. 833.

Petitioner acknowledged that he was concerned that the life span of his station could be extremely short because CBS might move its affiliation from him to a VHF station (R 107). He conceded (R 108) that such a change of affiliation would have been legal; and this is recognized in his brief (pp. 24, 25). Such a change of affiliation from petitioner to another station would have left him in a much worse position than did the challenged transaction, since there would have been no occasion for CBS to relieve him of his recently incurred investment in the station. Moreover, on petitioner's premise that an unaffiliated UHF station could not operate in Milwaukee, a change of affiliation to the other UHF station would have left that station the only UHF station in the market; and if CBS had affiliated with a VHF station, neither of the UHF stations could have survived.

Accordingly, the number of stations in the market was no more reduced by the cancellation of petitioner's affiliation because of CBS' acquisition of a station than would have been the case if there had been merely a change of affiliation. From the standpoint of the antitrust laws, the difference between the two transactions is without significance.

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*Even under the stricter limitation on acquisitions imposed by Section 7 of the Clayton Act, the acquisition of a business which "faced the grave probability of a business failure" is not prohibited. *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 302. See also *United States* v. *Maryland & Virginia Milk Producers Association, Inc.*, 167 F. Supp. 799, 808 (D. C.). Petitioner testified that he knew that Bartell "had an unsuccessful operation" (R 108).

Cf. *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (7th Cir.), cert. den. 345 U. S. 942; *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289 (2d Cir.).

In the latter case, it was held that the Sherman Act was not violated by a magazine publisher which discontinued the distribution of its magazines by the plaintiff, set up competing wholesalers which it subsidized, and actively persuaded competing publishers to take their business away from plaintiff and give it to the new subsidized wholesalers. The Court wrote (225 F. 2d at 293):

> "The nub of the matter is that the peculiar features of schemes for price fixing and elimination of competition which appear in such leading cases as Interstate Circuit v. United States, 1939, 306 U. S. 208, United States v. Masonite Corp., 1942, 316 U. S. 265 and United States v. United States Gypsum Co., 1948, 333 U. S. 364, are wholly absent here. Curtis had a legal right to break away from a wholesaler whose service it considered unsatisfactory and to set up and encourage by subsidy new competing wholesalers; and there is no reason apparent to us why Curtis should not use every reasonable effort to influence and persuade other national distributors to patronize the new competing wholesalers."

The Report of the Attorney General's Committee To Study The Antitrust Laws (p. 28) pointed to the similarity between the exclusive dealership cases and those dealing with vertical integration, such as *United States* v. *Columbia Steel Co.*, 334 U. S. 495. The Committee noted that the Section 1 test of reasonableness applies whether exclusive dealings are "achieved by ownership or otherwise". Petitioner cites no authority to show that there is any antitrust distinction between the two situations, and there is none.

The claim that competition was restrained is not strengthened by the fact that CBS purchased petitioner's

equipment. It has been pointed out above (Point I) that the purchase followed the contract termination, which is the sole basis for petitioner's claimed injury. Further, under the same contract by which CBS purchased his equipment, it sold to petitioner the Bartell equipment. Petitioner does not assert that the physical operation of the station, under the license which he retained, could not have been undertaken with the Bartell equipment. On his own premise, it was the cancellation of the affiliation, and not the equipment purchase, which made it impossible for him to survive in the Milwaukee market.

Finally, petitioner charges CBS with exerting a restraining effect "on the future development of the UHF spectrum" (p. 26). In effect, he seeks to make CBS responsible for the lack of success of UHF stations throughout the country. The claim overlooks CBS' four-year effort to make its UHF station a success. It could have substance only on the fantastic assumption—for which there is not a shred of evidence—that CBS acquired the station in order to make it fail. Petitioner's own contentions, as well as the well known history of the industry reflected in his affidavit (R 247-8), affirmatively establish that the decline in the number of UHF stations "was due to the competition in the market place, in the midst of which even giants may fall". *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F. 2d 289, 291 (2d Cir.).

B. THERE WAS NO MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION IN VIOLATION OF SECTION 2.

Under Section 2, the threshold inquiry is to determine the relevant market in which the alleged monopoly has been obtained or sought. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 394; *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418, 420 (D. C. Cir.), cert den. 355 U. S. 822; *Report of the Attorney*

General's Committee to Study the Antitrust Laws, p. 44. At the oral argument in the District Court, petitioner's counsel defined the relevant market as "UHF in Milwaukee" (R 275). That is the market which his present brief repeatedly asserts (pp. 18, 26, 34-5) that CBS monopolized.

Petitioner's market definition destroys his case under Section 2 at the very outset. "UHF in Milwaukee" could be considered a market by itself under that section only if there were no competition between UHF stations and VHF stations in the same city. *United States* v. *E. I. duPont de Nemours & Co., supra; Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320. That they do compete with each other is indisputable. Indeed, the intensity of the competition between the two types of stations, to the decided disadvantage of UHF, is repeatedly referred to in petitioner's complaint (R 13, 14, 19). It is a matter which has been judicially noticed on several occasions by the Court below. See *Greylock Broadcasting Co.* v. *United States*, 231 F. 2d 748, 749 (D. C. Cir.); *WIRL Company* v. *United States*, 253 F. 2d 863, 865 (D. C. Cir.), judgment vacated on other grounds 358 U. S. 51; *Owensboro On The Air* v. *United States*, 266 F. 2d 702, 704 (D. C. Cir.).

Acceptance of petitioner's market definition would lead to the absurd conclusion that any UHF station in any area is a monopolist if its only competition in that area comes from a VHF station.

Lacking evidence of monopolization in any relevant market, petitioner would have this Court disregard the presence in Milwaukee of the other networks and the other stations on the ground that (p. 34) "the other networks, having VHF affiliations, were not interested in UHF", which was the only source for expansion. In effect, CBS is accused of monopolization because it was the only network which was willing to have its programs presented in Milwaukee over a technically handicapped UHF channel.

CBS can no more be charged with responsibility for the failure of applicants to seek the available UHF channels in Milwaukee than can NBC, ABC or the set manufacturers who produced receivers that can receive only VHF signals. If CBS was a monopolist, it is the only monopolist ever to appear before this Court after it had been driven out of business by the competition of those with superior facilities.

Petitioner was obviously driven to the concept of "UHF in Milwaukee" as the relevant market because there is no other area of its business in which it can be claimed that CBS had a monopoly. Both as a national network and as a station operator in Milwaukee, CBS was faced with intense competition. In Milwaukee, CBS competed with two, and later three, stations which had decided physical advantages. After four years of effort, it succumbed to that competition. As a national network, it had, on petitioner's own statement (Brief, p. 11), about one-third of the market for national television advertising. This patently does not establish monopoly. Cf. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 424; *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 527-8.

The offense of monopolization can be established only by showing that the defendant has acquired the power to exclude competitors from the market and consequently to fix prices. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432 (2d Cir.). The claim that CBS was in a position at any time to exclude competitors from any conceivably relevant market is fully disproved on the record. The only power which it had was the power to select the outlet for its programs. Both before and after CBS acquired its station, those programs were presented in Milwaukee under intensely competitive conditions.

The documents annexed to petitioner's opposing affidavit (R 258, 260), as well as the uncontradicted statements of CBS' officers (R 54, 191), show that in determining the price to be charged for its facilities—a price which was half that of its principal competitor, WTMJ (R 141, 260)*—CBS was necessarily guided by competitive conditions in the market. At no time did CBS have any of the identifying characteristics of a monopolist.

The charge of attempted monopolization is likewise without basis in the record. First, it falls with petitioner's fallacious definition of the relevant market. In view of the genuine competition between stations of the two types, CBS could have attempted to monopolize the station market only on the absurd assumption that its UHF operation might drive off the air the superior VHF stations. Secondly, there is not a shred of evidence that CBS sought the Milwaukee station for any but its professed purposes of assisting in the promotion of UHF service and of making a profit (R 31-2, 162-3).

To establish the offense of attempted monopolization, there must be proof of "specific intent to accomplish the unlawful result of monopolization". *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *United States* v. *Griffith,* 334 U. S. 100, 105; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432. No such intention can conceivably be shown in this case. Attainment of the power to exclude others, which is the distinguishing feature of monopoly, is in this regulated industry a legal, as well as a practical, impossibility. The fact of regulation establishes not only the impossibility of monopolization and hence the futility of the attempt, but also that there cannot be that "dangerous

*The CBS Rate Committee suggested the rate of $700 an hour for its new station (R 260). This was the same rate that petitioner had just made effective (R 258). The rate on station WTMJ was $1400 per hour (R 141).

probability" of the result which is an essential ingredient of the offense of attempting to monopolize. *Swift & Co.* v. *United States,* 196 U. S. 375, 396.

III.

THE AUTHORITIES ON WHICH PETITIONER RELIES SHOW THE FALLACY IN HIS CONTENTION THAT CBS USED "LEVERAGE POWER" IN MILWAUKEE.

The basic error in petitioner's position—and in that of the dissenting Judge below (R 305-6)—is shown most strikingly by their reliance on *United States* v. *Radio Corporation of America,* 358 U. S. 334. Petitioner states (p. 25) that that case presented "the same situation as ours". Not only are the two situations wholly different; the position taken by the Department of Justice in later proceedings in that case specifically affirmed the legality of a transaction identical with that here involved.

The complaint in the *RCA* case alleged that NBC, which already owned five VHF stations, sought to acquire stations in five of the eight largest markets in the country. This could be done only if it gave up one or more of its stations in smaller markets. The complaint alleged that in order to force Westinghouse to exchange its station in Philadelphia, the fourth largest market, for NBC's Cleveland station, NBC threatened Westinghouse with loss of its network affiliations in Philadelphia and Boston and with the denial of an NBC affiliation in Pittsburgh and in any other market where Westinghouse might acquire a station.

It was the tie-in between different markets, and consequent use of "leverage" wholly absent here, that constituted the gravamen of the Government's complaint against RCA and NBC. This is shown by the terms of the final judgment which was entered on consent after remand by this Court, and by the subsequent proceedings under that judgment. The text of the judgment is published in 18 Pike & Fischer

RR 2153. It was before this Court in *Westinghouse Broadcasting Co.* v. *United States*, 364 U. S. 518.

The judgment enjoins the defendants from coercing or attempting to coerce any person to transfer a broadcast station to either defendant "by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any *other* television broadcast station controlled by the same person . . ." (emphasis added). It explicitly recognizes the right of the defendants to acquire stations in any of the eight largest markets by means which do not constitute an unreasonable restraint of trade; and except with respect to an asserted use of non-affiliation in other markets, it places on the Government the burden of proof on the issue whether a proposed acquisition was obtained by acts constituting an unreasonable restraint of trade.*

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*The pertinent portion of the judgment reads as follows:

"NBC, and RCA during any period of time when it directly or indirectly controls or has a substantial ownership interest in a television network, are each enjoined and restrained from:

(A) Coercing or attempting to coerce any person to sell or otherwise transfer any ownership interest in any broadcast station to either defendant, or to any person directly or indirectly controlled by either defendant or in which either defendant directly or indirectly has a substantial ownership interest, by terminating or threatening to terminate or refusing or threatening to refuse to enter into, an NBC network affiliation agreement with any other television broadcast station controlled by the same person or in which such person has a substantial ownership interest;

(B) Acquiring directly or indirectly any substantial ownership interest in any television broadcast station in the market area of New York, Chicago, Los Angeles, Detroit, Boston, San Francisco, or Pittsburgh, unless

(1) defendants shall have given written notice of the proposed acquisition to plaintiff, affording plaintiff opportunity to apply to this Court within thirty days after such notice for a determination by the Court as provided in clause (2) hereof, and

Pursuant to the consent judgment, NBC and RCA gave notice of their proposal to acquire television stations in Boston and San Francisco. After full investigation, the Department of Justice decided not to apply to the Court for a determination as to whether the acquisitions were permissible. Westinghouse moved to intervene, claiming that the judgment would be violated by NBC's proposed acquisition of a station in Boston, which would result in the loss of Westinghouse's NBC affiliation there. Its motion was denied, *Westinghouse Broadcasting Co.* v. *United States,* 186 F. Supp. 776 (E. D. Pa.), and its appeal to this Court was dismissed (364 U. S. 518).

The record in this Court (October Term 1960, No. 484) contains the text of a report by the Department of Justice to the Chairman of the House Committee on the Judiciary, describing the investigation of the proposed acquisitions which had led to the conclusion that they did not violate the *RCA* judgment. That report, dated May 26, 1960, states that "the initial conspiracy depended for its illegality upon the unlawful means, not found here, which were used by NBC to gain advantage in one market by use of the affiliation power with respect to another". The following paragraph of the report is directly pertinent to this case:

> "True, the loss of NBC affiliation by Westinghouse and KRON [*] may result in economic injury to their broadcasting operations in Boston and San Francisco. Such injury, however, is attributable to

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(2) if plaintiff shall have so applied, the Court shall have determined that the consent of the other party to the proposed acquisition was not obtained by acts or conduct of NBC or RCA relating in any way to the negotiations for the proposed acquisition, which acts or conduct constitute either (a) an unreasonable restraint of trade (as to which issue plaintiff shall have the burden of proof) or (b) a violation of subsection (A) of this Section IV (as to which issue the defendants shall have the burden of proof);".

*KRON was the NBC affiliate in San Francisco which faced the loss of affiliation if NBC acquired a station in that market.

> exercise by NBC of its option to terminate the affiliation relationship rather than to acts or conduct of RCA or NBC improper under the decree."

Since acts "improper under the decree" included acts constituting "an unreasonable restraint of trade", the Department's report is a plain declaration that "the exercise by NBC of its option to terminate the affiliation relationship" by reason of its acquisition of another station in the market did not constitute such a restraint. That is the "same situation as ours"; it is quite different from the situation described in the complaint which was before this Court in *United States* v. *Radio Corporation of America, supra.*

The other authorities cited by petitioner likewise show the fallacy in his effort to find an illegal tie-in here. In *Lorain Journal Co.* v. *United States,* 342 U. S. 143, it was held that the publisher of the only newspapers in a city could not refuse to accept advertising from businesses which patronized a radio station in that city. There, as in *Schine Chain Theatres* v. *United States,* 334 U. S. 110, and *United States* v. *Griffith,* 334 U. S. 100, there was an actual monopoly in one area that was used to put pressure in another area on those who dealt or sought to deal with the monopolist. Here, CBS was one of three competing networks; it was not a monopolist in any sense. And no "leverage" use was made of its programs in order to drive a bargain in another area.

In *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, the decree in a prior action by the Government established that the defendant had a monopoly. It was held that defendant's refusal to sell to plaintiff was motivated by the desire to perpetuate its conceded monopoly.

In *United States* v. *General Motors Corp.,* 121 F. 2d 376 (7th Cir.), the violation of Section 1 consisted of a tie-in

arrangement by which the defendant required purchasers of its automobiles to buy from it another distinct service, automobile financing. Here, but a single service is involved. CBS is seeking to reach the public with its own programs, and it decided to do so itself rather than through an affiliate. It did not use its position as a program supplier to coerce any activity or secure any advantage whatever in the competitive Milwaukee market. The inapplicability of the *General Motors Corp.* case to situations like the present one has been recognized in opinions upholding changes in exclusive automobile dealerships. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 906 (D. Md.), aff'd 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556, 558 (4th Cir.).

In each of the cases on which petitioner relies, there was either an actual monopoly or a tie-in arrangement. Here, CBS had no monopoly and there was no tie-in. Petitioner seeks to apply those cases to the present situation by claiming that CBS used "its leverage power as a network to enter into the business of operating a local TV station" (p. 24). What petitioner means by CBS' "leverage power as a network" is the power to withhold its programs, and the use of that power can mean nothing other than the threat to terminate its affiliation (Brief, pp. 7, 12, 14).

On this record, it cannot be controverted that CBS did not in any way use a threat to disaffiliate in order to enter the local market. It entered the local market by two acts,—the purchase of Bartell's station and the termination of petitioner's affiliation. We have pointed out above (Point I) that neither of those acts involved any threat to disaffiliate or other use of leverage. CBS had no affiliation with Bartell, and it used a dummy to negotiate with him. It terminated its affiliation with petitioner by simple notice, with no threat of any kind.

Moreover, the only act which could conceivably have been brought about by the exercise of any pressure, express or implied, was the sale by petitioner of his equipment, which occurred after the contract termination. That sale did not contribute in any way to the alleged market restraint on which petitioner's case is based.

There is, and obviously can be, no contention that petitioner's equipment was unique, or that CBS required it in order to enter the Milwaukee market. The equipment transaction was an exchange; it did not disable petitioner from broadcasting. He claims that he could not continue in business, not because of any inadequacy in the Bartell equipment which he acquired, but because he was no longer to have the CBS programs. CBS' acquisition of petitioner's equipment was not a step either in CBS' entry into the market or in petitioner's leaving it.

CBS is charged with restraining trade in television broadcasting, not in equipment. There is neither allegation nor evidence that the market for equipment was affected in any way by the challenged transaction. And petitioner was not in the business of selling equipment. He claims to have been injured in his business as a broadcaster. His claim of injury, as has been shown, is not that an inadequate price was paid for his equipment *qua* equipment, but that he lost the value of his station as a going business. That value petitioner attributes to the CBS affiliation. The very authorities on which he relies show that his claimed injury did not result in any sense from the exercise by CBS of "leverage" power.

IV

PETITIONER'S ARGUMENT THAT THE OWNERSHIP OF A STATION BY A NETWORK IS A *PER SE* VIOLATION OF SECTION 1 GOES BEYOND THE ISSUE IN THIS CASE AND IS ERRONEOUS AS A MATTER OF LAW

Petitioner asserts (p. 27) that CBS's acquisition of a Milwaukee station—"wholly apart from its illegal use against Poller of the leverage of its network power"—constitutes an unreasonable restraint of trade. In effect, he asks this Court to disregard the affirmative showing that there was here no restraint and to adopt a rule making network ownership of local stations a *per se* violation of the Sherman Act.

In advocating that rule, petitioner wanders far from his own claim of injury. He describes alleged effects of the challenged practice on other networks and on program suppliers and advertisers as though he were in the position of the Attorney General or the FCC. Those alleged restraints on competition are wholly unrelated to the injury which he claims to have suffered.

> ". . . in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> ". . . Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm." *Conference of Studio Unions* v. *Loew's Inc.*, 193 F. 2d 51, 55 (2d Cir.), cert. den. 342 U. S. 919.

The only area of the economy in which petitioner conducted his business was that of local broadcasting in Milwaukee. His discussion of possible restraints elsewhere has no bearing on this case since "the right of action given to persons injured through the resultant tendency to substantial lessening of competition or creation of monopoly" includes "such injury only as such tendency to lessen competition or to create monopoly engendered". *Peterson* v. *Borden Co.*, 50 F. 2d 644, 646 (7th Cir.).* In Milwaukee, it has been shown that, on petitioner's own allegations, there was no restraint and no monopolization.

Furthermore, the restraint by which he claims to have been affected—the alleged reduction in the number of stations in the market—did not result from the fact that one of those stations came under the ownership of a network. Petitioner's brief (p. 27) states that "realistically the removal of CBS affiliation was the same as the removal of all affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations". This is an acknowledgment that the alleged restraining effect of ownership does not differ from that caused by affiliation. It shows that whether or not one of the stations in Milwaukee was owned by a network had no effect whatever on the number of stations that could remain in business there.

The rule for which petitioner contends, moreover, must be rejected on the basis of the very authorities which he cites. In *United States* v. *Paramount Pictures*, 334 U. S. 131, 173-4, this Court explicitly rejected the Government's contention that "vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*". And in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525, it stated:

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*See also *Bookout* v. *Schine Chain Theatres*, 253 F. 2d 292 (2d Cir.); *Affiliated Music Enterprises* v. *Sesac, Inc.*, 268 F. 2d 13, 16 (2d Cir.), cert. den. 361 U. S. 831.

> "It seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act."

Petitioner's case on this point is obviously much weaker than was that of the Government in *Paramount*. There, it had been found that the major distributors had engaged in a horizontal conspiracy which warranted treating each of them as a monopolist for certain purposes. Here, there is no suggestion of any collusive action among the three networks.

In place of the requirement stated in *Paramount* and *Columbia Steel* that vertical integration may be held invalid only by a showing that it unreasonably restrains competition, petitioner presents an argument of legislative policy that might appropriately be addressed to the Congress or the FCC. It has no place in an argument before this Court. As stated in the *Columbia Steel Co.* case (at 526):

> "If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts."

In this connection, it may be noted that concern over the disparity in bargaining power between automobile manufacturers and their dealers led to the enactment of a specific statute "to supplement the antitrust laws". 15 U. S. C. § 1221, *et seq.* In *Miller Motors, Inc.* v. *Ford Motor Co.*, 149 F. Supp. 790, 810-11 (N. D. N. C.), aff'd 252 F. 2d 441 (4th Cir.), it was claimed that the market control exercised by the manufacturer violated the Sherman Act. The Court referred to the new statute and its legislative history and stated that "Congress evidently did not share this view". See also *Nelligan* v. *Ford Motor Co.*, 262 F. 2d 556, 559 (4th Cir.).

The legislative issue to which petitioner's argument is addressed is one which has long been before the Commis-

sion. It has repeatedly been decided in favor of network ownership. Petitioner refers (p. 15) to the 1941 Report on Chain Broadcasting, in which the Commission stated that as an initial matter it might have reached the conclusion "that the businesses of station operation and network operation should be entirely separate". The regulations adopted on the basis of that report, however, expressly permitted network ownership, subject to the condition that competition not be substantially restrained thereby. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 207-8. That condition was carried over into the television regulations under which the present acquisition was approved by the Commission.*

Furthermore, whatever its past misgivings, the Commission has repeatedly rejected the position for which petitioner contends. *ABC-Paramount Merger Case,* 8 Pike & Fischer RR 540, 629-30; *St. Louis Telecast, Inc.,* 12 Pike & Fischer RR 1289, 1372; *New Britain Broadcasting Co.,* 14 Pike & Fischer RR 725; *National Broadcasting Company, Inc.,* 20 Pike & Fischer RR 411, 419. In *St. Louis Telecast, Inc., supra,* the Commission stated:

> ". . . We have recognized that network broadcasting is an essential of the American pattern of broadcasting, and that the ownership of broadcast stations in major markets by the networks is an important element of network broadcasting. . . ."

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*Section 3.658(f) of the Federal Communications Commission's Rules and Regulations reads:

> "Network ownership of station. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization, for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

The same position was stated in the Report and Order by which the Commission adopted the "5 and 2" amendment to the multiple ownership rule. 11 Pike & Fischer RR 1519, 1523.

In direct conflict with the considered position of the Commission, petitioner argues for a rule of *per se* illegality which would brand network ownership of stations as one of those "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal". *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5. The Court below (R 299) properly rejected this contention with the statement that much weight should be given to "the expert Commission's regulation . . . that such limited multiple ownership of facilities in the field it regulates" does not violate the statute. Petitioner asks this Court to adopt a contrary rule, and to do so retroactively in a private action brought by one whose claim of injury has been shown to result solely from a contract termination free of any restraint in or monopolization of the only market in which his business was conducted. His claim is both irrelevant to his alleged private injury and wholly lacking in merit.

V.

THE CLAIM UNDER SECTION 1 IS UNTENABLE FOR THE FURTHER REASON THAT PETITIONER'S ALLEGED INJURY RESULTED FROM THE UNILATERAL ACTION OF CBS. AS A MATTER OF LAW, THE ESSENTIAL ELEMENT OF A CONSPIRACY IS LACKING.

Petitioner charges that the conspirators with CBS were CBS Television, a division of the company, and two of its employees, as well as Bartell and Holt. To find a conspiracy among the company itself, one of its unincorporated divisions and the two employees who participated in its action is to read the conspiracy requirement out of the statute.

The conclusion that Bartell and Holt, or either of them, entered into a conspiracy with CBS to bring about the alleged restraint would be contrary to the controlling authorities.

A. CBS Television is not a legal entity. It is an internal division of the company through which all of its television activities were conducted (R 48, 144). It is not a "subsidiary", and the corporation is not its "parent" (R 195). Petitioner asserts (p. 30) that it was created to operate "in an independent area of activity—television broadcasting—which for operational purposes may be deemed a separate industry." That area of economic activity is the only one in which any of CBS' acts bearing on this case took place. It may even be assumed, *arguendo*, that there might be a conspiracy between different divisions of the same company which were engaged in different areas of economic activity. That assumption does not aid petitioner's case. His charge is against CBS, a single corporation, and all of that corporation's television activities were pursued through a single division, CBS Television. It is thus wholly immaterial that the company had five other unincorporated divisions operating in different areas (R 48). On petitioner's premise, every unilateral action of a corporation which had two divisions would constitute a conspiracy between the corporation and the division which performed the act.

Petitioner purports to find sinister significance in the fact that the divisional organization of CBS was adopted shortly after this Court's decision in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593. Assuming that the date is more than coincidence, it is difficult to see how CBS can be criticized for adopting a form of organization that would reduce its legal risks. In any event, the statement on the subject in the *Timken* case is not impaired by the fact that it was a *dictum* in the dissenting opinion of Mr. Justice Jackson. That opinion referred to a concession by the Government that if the principal defendant, instead of forming

subsidiary corporations, had set up separate departments in its business, there would have been no conspiracy. That position is reiterated in the Report of the Attorney General's Committee to Study the Antitrust Laws (p. 35). There is no contrary authority.

Even if different divisions of the corporation were here involved, petitioner's position would lead to absurd results. It would mean that employees working in two different divisions of a corporation could not discuss cooperation without violating the antitrust laws. No large corporation which is organized into separate divisions could coordinate its activities. The absurdity is accentuated in a situation like the present one in which, as stated above, all the activities were those of a single division of the corporation.*

B. Nor is the conspiracy claim aided by naming as conspirators two of the employees who acted on behalf of the corporation. The authorities cited by petitioner (p. 34) to the effect that corporate officers can be members of a conspiracy with their corporation were all cases in which there were other conspirators. In *Schine Chain Theatres* v. *United States*, 334 U. S. 110; *United States* v. *Yellow Cab. Co.*, 332 U. S. 218; and *Interstate Circuit* v. *United States*, 306 U. S. 208, several corporations, as well as individuals, were found to be conspirators. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, involved a conspiracy on the part of a corporation and its officers and "at least some" of its numerous wholesalers. Here, CBS is charged with conspiring with itself. Cf. *Nelson Radio*

*Petitioner's contention (p. 31, footnote 25) that "at the very least" a division is "an unincorporated association" is untenable. This is shown by his reliance on *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, where it was held that "merely as a procedural matter" (at 390), a union was suable in its own name. No such problem is presented here. CBS, a corporation, is answerable for the acts of its employees in all its divisions. If a part of a corporation were an association, who would be its members?

& Supply Co. v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir.), cert. den. 345 U. S. 925.

C. Petitioner mistakenly asserts (p. 31) that the determination that Bartell knew nothing of the CBS plan was based solely on Bartell's *ex parte* affidavit. Petitioner had the opportunity to take Bartell's deposition, but did not do so.* Moreover, Bartell's affidavit is corroborated by Holt, both in his affidavit (R 92) and in the deposition which petitioner did take. Holt testified that he did not want anyone to know that he was in Milwaukee for CBS (R 130), that he did not tell Bartell on whose behalf he was dealing (R 138), and that when he telephoned Bartell to tell him that the option had been assigned to CBS, Bartell was "so flabbergasted" that he called Holt back a few minutes later to make sure that he had heard him right (R 133-4). And petitioner's brief (p. 4) states that Holt secured an option from Bartell "without disclosing CBS' interest in the transaction".

Petitioner further contends that Bartell knew when the deal was consummated that the sale was to CBS, and accordingly became a conspirator when CBS entered the scene. There is not a shred of evidence, however, that Bartell knew of or shared in any allegedly illegal purpose. Without such evidence, it cannot be held to have been a conspirator. "The proof must show that the illegal purpose was mutual." *Carter-Crume Co.* v. *Peurrung*, 86 Fed. 439, 442 (6th Cir.).**

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*Cf. *Orvis* v. *Brickman*, 196 F. 2d 762, 765-6 (D. C. Cir.); *Wise* v. *Universal Corporation*, 93 F. Supp. 393, 398 (D. Del.).

**The cases cited by petitioner (p. 32, footnote 27) are clearly inapposite. *Calcutt* v. *Gerig*, 271 Fed. 220 (6th Cir.) involved participation in mob violence for a purpose known to all the defendants. *United States* v. *Standard Oil Co.*, 152 Fed. 290 (E. D. Mo.) and *Rudner* v. *United States*, 281 Fed. 516 (6th Cir.) both contained express findings that the defendants, when their participation commenced, knew that there was a conspiracy.

D. With respect to Holt, the record also shows that, as a matter of law, he may not be held to have been a conspirator. Holt went to Milwaukee at the request of CBS (R. 121, 135). He "had been given the particular job of getting an option on WOKY" (R 123, 127-128). His only interest was in carrying out that assignment (R 124). No issue is raised by petitioner's assertion (p. 33) that Holt "owned a contingent remainder in some of the scraps of the conspiracy which would fall his way if the main conspirator decided at any time to alter its plan". At most this is a charge that Holt might have an interest in the abandonment of the conspiracy. At the very point in the record cited by petitioner, Holt testified that he was always willing to assign the option to CBS at any time they asked for it (R 138). No purpose on his part to accomplish any restraint can be founded on his statement that it was taken for granted that, the option being in his name, if CBS did not exercise it "I probably would have the right to do what I wanted to do" (R 138). As he stated at an earlier point (R 135), "The option was assignable but in my name, and I naturally was going to give CBS the assignment as far as I was concerned." Once the option was exercised, Holt had no further interest in the matter.

No significance can be attached to petitioner's effort to dramatize Holt's mission as one in which care was taken to assure secrecy. Brokers in the fields of real estate and finance regularly engage in similar transactions, with equal insistence upon secrecy. Whether Holt was technically an employee or an independent contractor is also immaterial.

Petitioner does not even contend that Holt knew of any purpose on the part of CBS to restrain or monopolize trade. All that is claimed (p. 33) is that he knew that Poller had an affiliation agreement which would be terminated, and that this "would destroy Poller". Such destruction could have been effected, however, by many wholly lawful business

transactions or even by acts which, though wrongful in some other sense, do not violate the Sherman Act. Cf. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127; *Mackey* v. *Sears, Roebuck & Co.*, 237 F. 2d 869 (7th Cir.); *Bender* v. *Hearst Corporation*, 263 F. 2d 360 (2d Cir.). Accordingly, petitioner's claim does not charge the offense of conspiracy to violate the Act.

"Those having no knowledge of the conspiracy are not conspirators." *United States* v. *Falcone*, 311 U. S. 205, 210, aff'g 109 F. 2d 579 (2d Cir.). The type of participation required to make one a conspirator was described by Judge Learned Hand in the *Falcone* case as follows:

> "It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome." (109 F. 2d at 581)

See also *United States* v. *Gerke*, 125 F. 2d 243, 246 (6th Cir.), cert. den. 316 U. S. 667.

Petitioner attempts (p. 33) to avoid the *Falcone* rule by asserting that Holt is not charged with aiding a preexisting conspiracy, but with being himself a party to the conspiracy. The contention is apparently cast in this form because it is plain that without Holt's participation there was no conspiracy which he could have aided. This claim does not aid petitioner's case. On the contrary, it is clear that greater participation, and a greater "stake in the outcome", must be shown to establish the formation of a conspiracy than are required to sustain a charge of aiding an existing conspiracy. In *Di Bonaventura* v. *United States*, 15 F. 2d 494 (4th Cir.), a conviction was reversed because the Court had charged that a landlord could be convicted of conspiracy on a finding that he knew that liquor was being manu-

factured in his premises and did not stop it. The Court wrote (at 496):

> "* * * This might have justified a conviction of maintaining a nuisance or of unlawful manufacture, but not a conviction of the felony of conspiracy, in the absence of any finding that the landlord entered into a combination or agreement to violate the law, or that he, with knowledge that a conspiracy existed, not merely that the law was being violated, aided the conspirators in carrying out their unlawful design."

On petitioner's own statement (R 109), there was no purpose on the part of either Bartell or Holt to promote or cooperate in any restraint of trade or monopolization on the part of CBS. Treating the testimony in the light most favorable to petitioner, and assuming a purpose on the part of CBS of which there is no evidence, there was at most a unilateral act by CBS, not a conspiracy, coupled with innocent acts by Bartell and Holt which helped to advance the CBS purpose. For this reason alone, it must be held as a matter of law that there was no violation of Section 1 of the Sherman Act.

VI.

THERE IS NO ISSUE AS TO A MATERIAL FACT JUSTIFYING THE DENIAL OF SUMMARY JUDGMENT.

The erroneous legal premises that permeate petitioner's argument are reflected in his contention that there are triable questions of fact. The asserted "subjective elements of motive and intent" (Brief, p. 35), which petitioner would submit to a jury, do not relate to any determinative issue. The material facts are admitted by petitioner, and the conclusions drawn by the Court below necessarily follow from those admitted facts. The decision

is in accord with a substantial body of authority disposing of similar claims as matters of law.*

Petitioner purports (pp. 36-8) to state "four instances" of the alleged acceptance by the Court below of CBS' version of the facts. Not one of them presents a triable issue of a material fact.

(1) Petitioner cites, without further comment, the Court's reference to the fact that the three networks are "fiercely competitive". His lack of comment is significant. At no point does petitioner challenge the fact that there is complete competition among the networks. He cites no evidence in the record to controvert that fact, and there is none. The existence of fully competitive conditions was affirmatively shown in the moving papers (R 52-5, 85-7). Petitioner took lengthy depositions for use on the motion, but made no effort to seek any facts to dispute that showing.

(2) Petitioner quotes the Court's statement (R 292) that "CBS chose not to buy Poller's station because it considered the $2,000,000 price too high". This is said to relate to the "decisive question" as to why CBS did not buy petitioner's station instead of that of Bartell. On what issue that question is "decisive", the brief does not state. Certainly, nothing in the Sherman Act gave petitioner a "right of first refusal" to sell his station to CBS. There is no conceivable antitrust theory on which a jury could be asked to pass upon the veracity of the testimony that CBS did not negotiate for the purchase of petitioner's station

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*Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, aff'd 239 F. 2d 176 (4th Cir.), cert. den. 355 U. S. 823; Interborough News Co. v. Curtis Publishing Co., 225 F. 2d 289 (2d Cir.); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911 (5th Cir.), cert. den. 345 U. S. 925; Boro Hall Corp. v. General Motors Corp., 124 F. 2d 822, rehearing denied 130 F. 2d 196 (2d Cir.), cert. den. 317 U. S. 695.

because it had learned that he had placed an excessive price on it.

The negotiation with petitioner in which CBS was unwilling to engage was for his business as a going concern. The value which petitioner attributed to that business was concededly a value created by CBS' own programs. Petitioner's complaint that CBS did not buy from him is a complaint that it refused to pay for the right to present its own programs in Milwaukee. Indeed, the full answer to petitioner's contention that CBS exercised the "leverage" of its position as a program supplier is found in the fact that it refrained from bargaining with him for the purchase of his station. Whatever the motive, the simple refusal to deal cannot be distorted into evidence of an antitrust violation.

Petitioner suggests, however, that a jury should be allowed to pass upon the question whether CBS did not plan in advance to "grind down his price". Petitioner offers only surmise and suspicion to overcome the positive statements of CBS' officers that no property purchase was contemplated when the affiliation was terminated (R 51, 157, 185).* Even if the issue were material, such conjecture would be insufficient to defeat summary judgment. Cf. *Thomas* v. *Mutual Benefit Health & Accident Assn.*, 220 F. 2d 17 (2d Cir.); *Banco di Espana* v. *Federal Reserve Bank*, 28 F. Supp. 958, 973 (S. D. N. Y.), aff'd 114 F. 2d 438 (2d Cir.); *Carlander* v. *Dubuque Fire & Marine Ins. Co.*, 87 F. Supp. 65, 69 (D. Ark.); 6 Moore's Federal Practice (2d Ed.) 2131.

The question which petitioner seeks to raise, moreover, is not a material one. The purchase by CBS of petitioner's equipment, it has been shown, followed the acts by which CBS entered the Milwaukee market. Far from contributing

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*CBS' president, Stanton, testified (R 157):

"I was the most surprised man in the world when I was told that he was offering his facilities to us."

to the injury on which this action is based, it was sought by petitioner and was of benefit to him. The sinister purpose which petitioner claims that a jury should be allowed to infer was not a purpose to accomplish the restraint of trade with which CBS is charged.

(3) Petitioner criticizes the Court's statement (R 297) regarding petitioner's representation that he would continue broadcasting in Milwaukee, but does not show how it creates any material issue. The brief fails to mention the fact that, under the very agreement which contained that representation, petitioner acquired the Bartell equipment. With that equipment and the license which he retained, petitioner was certainly as capable of staying in business as was Bartell.

If, as petitioner contends, he "could not survive without an affiliation", it necessarily follows that Bartell could not have survived. Thus the Court's statement which he challenges is plainly immaterial to the antitrust issue. Petitioner's own allegations compel the conclusion that CBS was not responsible for a reduction of the number of stations in the market.

(4) Petitioner quotes the Court's statement to the effect that the equipment purchase was not sought by CBS. He does not, however, challenge the accuracy of that statement. Indeed, he admits (p. 37) that he "importuned CBS to take his equipment off his hands", and that this occurred after the affiliation was cancelled. These statements confirm the showing made above that no "leverage" was exercised and that the equipment purchase is irrelevant to the claim on which this action is based. Further, petitioner fails to point out the materiality of the testimony that CBS agreed to buy his equipment because its officer felt sorry for him. Surely,

no antitrust claim can be based on the fact that its action proceeded from such a sentiment.

THE JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1961.

Lou Poller, Petitioner, v. Columbia Broadcasting System, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 19, 1962.]

Mr. Justice Clark delivered the opinion of the Court.

The question involved here is whether this treble damage action based on alleged violations of the restraint of trade and monopoly sections of the Sherman Law [1] was rightly terminated by a summary judgment of dismissal. The petitioner, Lou Poller, is the assignee of the Midwest Broadcasting Company, a dissolved corporation. In 1954 Midwest was the owner and operator of WCAN, an ultra high frequency (UHF) [2] broadcasting station located in Milwaukee. The station was affiliated with

[1] Section 1 of the Sherman Act provides that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1.

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 2.

[2] The terms Ultra High Frequency (UHF) and Very High Frequency (VHF) refer to the wave lengths of the electrical impulses which are projected by broadcasting stations to carry programs to receiving sets. Prior to 1952 only the VHF portion of the spectrum was authorised. Generally TV receivers are manufactured only to receive VHF signals and must be modified by an owner to receive UHF.

the Columbia Broadcasting System network and was of the alleged value of $2,000,000. Poller charged that the respondents in 1954 entered into an unlawful conspiracy to eliminate WCAN from the broadcast field in Milwaukee.[2] It was a part of the conspiracy that respondent Holt was to secure in his name an option to purchase WOKY, a competing but inferior UHF broadcaster in Milwaukee. When and if the Federal Communications Commission amended its multiple ownership rules, then under consideration, so as to permit CBS to own UHF stations in addition to its VHF ones, Holt was to assign his option to CBS if it so elected. In that event, it was agreed CBS would cancel its affiliation agreement with WCAN pursuant to its option in that contract and in due course consummate its purchase of WOKY. This would place WCAN in the precarious position of competing with the two major national networks with stations in Milwaukee. Being unable to survive such competition, its only course would be to liquidate at distressed prices its valuable equipment and facilities only recently acquired. CBS might then acquire them at its own price for use in its new operation which was necessary because of the inferior quality of those of WOKY. CBS would then have Midwest's superior facilities and equipment which with the WOKY license would enable it to start broadcasting at a minimum expense and the least possible delay. Poller further claimed that the overall purpose of CBS was to destroy UHF broadcasting, which had only been permitted to enter the field in 1952, in order to protect its vast interest in VHF stations throughout the United States. Finally, he alleged the conspiracy was so successful that CBS not only acquired WCAN at a loss of

[2] The conspirators were alleged to be Columbia Broadcasting System, Inc.; CBS-TV; J. L. Van Volkenburg, President of CBS-TV; H. K. Akerberg, Vice President of CBS-TV; Bartell Broadcasters, Inc., owners of WOKY; and Thad Holt, a management consultant.

$1,450,000 to Midwest but that the latter was obliged to buy the facilities and equipment of WOKY at exhorbitant prices and to agree to continue broadcasting from the latter's premises—which was done "in order to pretend that there was no restraint of trade or elimination of competition . . . ." However, WCAN continued in business only 10 days after CBS started its broadcasts on February 17, 1955. CBS discontinued UHF broadcasting in 1959 when it became affiliated with a Milwaukee VHF station.

At the hearing on the motion for summary judgment the trial judge held that the injury suffered was *damnum absque injuria*, stating that CBS had a right to purchase WOKY, subject to Federal Communications Commission approval, and to cancel its affiliation contract with WCAN. 174 F. Supp. 802. The Court of Appeals affirmed with Judge Washington dissenting, 284 F. 2d 599, and we granted certiorari, 365 U. S. 840. We now conclude that there was a genuine issue as to material facts and that summary judgment was not therefore in order.

I.

Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944). We now examine the contention of the parties to determine whether under the rule summary judgment was proper.

II.

The respondents in their motion for summary judgment depended upon the affidavits of four persons. The first is Richard Salant, Vice President of CBS; another, Jay Eliasberg, Director of its Research Division; a third, Lee Bartell, who made the sale of WOKY to CBS at a $50,000 profit; and finally, Thad Holt, a codefendant who received $10,000 from the transaction. These were supplemented by material taken from petitioner's depositions of Salant and CBS President Stanton. It is readily apparent that each of these persons was an interested party.

Respondents appear to place most reliance on the Salant testimony, and we shall, therefore, take it up in some detail. It projects three defences, the first being that there was no conspiracy for the following reasons: CBS–TV was not a separate entity but only a division of CBS, and therefore there could be no conspiracy between the two; Holt, the cover man in securing the option and purchase of WOKY, "had been given the particular job" by CBS and therefore was not a conspirator; and Bartell never shared in any illegal purpose that would bring him into the conspiracy. Secondly, in any event, the only issue in the case is the legality of the cancellation of the affiliation agreement by CBS which was merely the legal exercise by CBS of "the normal right of a producer to select the outlet for its product." And, finally, the monopoly charges are entirely "frivolous." The trial judge accepted the second defense.

III.

It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlaw-

ful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law. See *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 624–625 (1953); *Eastman Kodak Co.* v. *Southern Materials Co.*, 273 U. S. 359, 375 (1927). Poller alleges and the affidavits, depositions, and exhibits indicate much more than the free exercise by CBS of the granted right of cancellation. A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this conspiracy. Moreover, "in a wider sense" Poller claims that a part of the conspiracy was "to wipe out the most outstanding UHF operator in the country [WCAN] and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF."

It is argued that CBS cannot conspire with itself. However, this begs the question for the allegation is that independent parties, *i. e.*, Holt and Bartell, conspired with CBS and its officers.[4] While respondents' affidavits assert that Holt acted in good faith as a special agent or employee for CBS and that Bartell was completely free of any evil motives directed toward WCAN, the trial judge indicated a belief that Holt was "an independent actor" and would have submitted the question of his status to the jury had he not disposed of the case on other grounds. Furthermore, Poller submitted a deposition of Holt, an exhibit to which showed CBS had furnished Holt

[4] We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries.

a complete analysis in writing of the Milwaukee market and the ownership and affiliation of the TV stations there, including WCAN. The deposition revealed that Holt had knowledge that the obvious purpose and necessary effect of the plan would be to eliminate independent UHF in Milwaukee and that he had a personal stake in its success. This included, *inter alia*, Holt's statements that he met with top CBS officials in New York for a briefing on his role, that he was a close friend of these officials, and that he would have retained the option for himself if unused by CBS. The latter admissions, when coupled with the uncertainty at that time of a Federal Communication Commission rule permitting CBS to purchase WCAN, suggest that the alternative plan was to let Holt exercise the option and take the affiliation if CBS could not. Likewise, Bartell's affidavit, barely a page and a half in the record, does not negative the allegations of conspiracy. Unquestionably, after knowing that Holt had in truth been acting for CBS and that the sale would prove disastrous to WCAN, he did file certain papers with the Federal Communications Commission requesting approval of the sale of WOKY. Poller had no opportunity to cross-examine him although he was a key witness to respondent's theory of the case. And it is noted that even though the transfer was uncontested before the Federal Communications Commission it received approval by a vote of only three Commissioners with the remaining two strongly dissenting.[5] It might be that on a trial Poller could substantiate his claims of conspiracy even against Bartell, although this would not be necessary to his case.

Respondents' answer to the charge that one of the purposes of the alleged conspiracy was to exert a restraining effect upon the development of UHF is that this is a

[5] 11 Pike and Fischer R. R. 913, 914.

"fantastic assumption—for which there is not a shred of evidence." An analysis of the record seems to indicate that in 1954 prior to the purchase of WOKY there were three UHF channels assigned to Milwaukee by the Federal Communications Commission, two of which (WCAN and WOKY) were operating; that since December 1953 CBS had been studying UHF markets preparatory to an expected change in Commission rules that would allow it to purchase two UHF stations in addition to its five VHF ones; that its staff rated Pittsburgh, St. Louis, New Haven-Hartford, and Milwaukee, in that order, as the most attractive; that CBS chose to enter the latter market and to buy WOKY rather than operating in Milwaukee on the third available channel; that WCAN's profitable operation in 1954, even with lower rates and competition from WOKY, was "immediately converted to a losing" one, although in 1955 WOKY was out of business; and that this reported loss of about $130,000 under CBS operation in 1955 contrasted sharply with the 66% increase in its profits nationally. Furthermore, reports in the record from CBS itself show that it always had recognized "a VHF station . . . would be preferable to a UHF . . . ." but that the latter had "specially good *short term* prospects" (emphasis supplied) in Milwaukee because it had "the characteristic of being at present (1954) a single station market." CBS further recognized that since its programming was "already working to build up UHF population . . . [through WCAN] there would be no short term loss to the network in continuing to give the support of CBS programming to the buildup of a UHF population . . . *at least until more VHF stations come in.*" (Emphasis supplied.)

The record indicates that Poller had built up a profitable UHF operation, which was recognized "as the most successful" in the United States. Even CBS officials pointed to it as an example of how "a vigorously and

aggressively managed UHF station can do well." In the short period of a year its public acceptance in Milwaukee was so great that 90% of the 260,000 TV sets in the area had been modified, at an expense of some $20 to each owner, so as to be able to receive UHF signals. While CBS had refused to enlarge the six month cancellation clause, at no time prior to the alleged conspiracy did it indicate an intention to cancel the WCAN affiliation.* It was, Poller claims, only pursuant to the conspiracy that CBS came into the Milwaukee market and eliminated both WCAN and WOKY. Since that time the total number of commercial UHF stations in the United States has steadily declined from 121 at the end of 1953 to 94 by midyear 1956. At the close of 1957 the number was only 88. In 1958 CBS itself abandoned a UHF station in Hartford, and in 1959 the very station in controversy here was likewise abandoned, leaving Milwaukee with no commercial UHF service. Instead, CBS has switched to VHF, affiliating with a Storer Broadcasting Company station which was authorized there the same year. It will be remembered that Mr. Storer is the same prospect who, Poller claims, indicated he would pay $2,000,000 for WCAN when the multiple rule was adopted but who cooled after a CBS warning. All of this may not be sufficient to warrant the finding that Poller contends for on this charge, but it does indicate more than fantasy, particularly in the light of the testimony of CBS Vice President Salant in his deposition that "it would be the kiss of death to UHF if either NBC or CBS abandoned a UHF station."

It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Cer-

* Indeed, such action would be unreasonable in light of the success of Midwest's initial operation and its highly favorable prospects with the expanded facilities and new equipment.

tainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.[7] It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

IV.

Other contentions of respondents are subject to ready disposition. They say that no restraint of trade resulted from CBS' termination of its affiliation with WCAN for this enabled it to support WOKY, the other UHF station in the Milwaukee area, which based upon Poller's own allegations was doomed without an affiliation. To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this Court's decision in *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959). And if it is meant to say that there was no restraint because CBS in canceling its affiliation with WCAN was merely doing what it had a right to do and the resulting demise of WCAN followed from normal market conditions, it erroneously assumes that CBS had an absolute right despite violations of the antitrust laws to exercise its contractual privilege. See Part III, *supra*. A further answer to the respondents' conten-

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[7] Compare *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257 (1948); *Arenas* v. *United States*, 322 U. S. 419, 434 (1944).

tion in this regard is that Poller has an additional claim that part of the conspiracy was the destruction of UHF entirely. The sole answer of CBS to that is "there is not a shred of evidence" to support such a charge. However, there has been no trial as yet, and the issue remains a factual one disputed under the pleadings and still undetermined.

CBS contends that the monopolization charges are frivolous. We find the record unclear on these claims. In view of our remand for a trial on the merits, we forego any comment thereon. The complaint does not allege the relevant market involved. In the trial court it was argued that UHF broadcasting in Milwaukee was the market, but on the record here we are unable to determine that issue. It may well be that on a trial appropriate allegations and proof can be adduced showing violations of § 2. See generally *International Boxing Club* v. *United States*, 358 U. S. 242, 249–252 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 648–654 (1957) (dissenting opinion). We believe it to be good judicial administration to withhold decision on these issues.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1961.

Lou Poller, Petitioner, v. Columbia Broadcasting System, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 19, 1962.]

Mr. Justice Harlan, with whom Mr. Justice Frankfurter, Mr. Justice Whittaker and Mr. Justice Stewart join, dissenting.

As I see it, this is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms. I think that the antitrust laws do not fit this case, and that the courts below were quite correct in holding that the respondents were entitled to judgment as a matter of law.

The litigation arises out of CBS' cancellation of an affiliation arrangement with WCAN, a UHF television broadcasting station in Milwaukee, owned by Midwest Broadcasting Company of whose property Poller is assignee. CBS maintains that such cancellation was but the legitimate exercise of a contractual right. Poller says that it was part of a conspiracy to restrain and monopolize trade in the television broadcasting business, violative of §§ 1 and 2 of the Sherman Act. Suing under § 4 of the Clayton Act,[1] Poller seeks to recover as damages the trebled fair value of the WCAN station and equipment, whose sale to CBS at a distress price he claims was forced upon him in consequence of CBS' cancellation of the WCAN affiliation contract.

[1] That section, 15 U. S. C. § 15, gives a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

Poller asserts that CBS, joined by others as conspirators, wanted to put him out of business as the first step in a grand design to destroy UHF broadcasting in Milwaukee, if not indeed throughout the United States. It is said that CBS looked with disfavor upon the growth of UHF broadcasting, being itself already heavily committed to VHF. As subsidiary steps towards the effectuation of this plan, it is charged that CBS chilled prospective purchasers of WCAN; acquired the only then competing UHF station in Milwaukee, WOKY; and later closed that station down.[2] CBS' co-conspirators are said to have been CBS-Television, an unincorporated division of CBS; certain officers of CBS; Bartell, the then owner of WOKY; and Holt, a management consultant, who at CBS' behest obtained from Bartell an option to purchase WOKY.

I assume that Poller would be entitled to proceed to trial if the record before the District Court had left open a genuine question of fact as to whether the alleged conspiracy had as its object the elimination of all UHF stations in the Milwaukee area, or even if it appeared that petitioner might prove that the respondents entered upon this course in order to reduce the number of UHF stations in Milwaukee from two to one, which was to be owned outright by CBS.[3] But for reasons given below, I think

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[2] The last of these allegations was not included in the complaint since the station acquired by CBS did not cease operations until after this suit was brought. It was alleged, however, in petitioner's supplemental affidavit in response to the motion for summary judgment.

[3] If such issues of fact were open and petitioner could prove at the trial that respondents' motives were unlawful, I think it would still be incumbent upon him to prove that the disaffiliation of WCAN was part of the illegal scheme. There is evidence in the record, not contradicted, tending to show that CBS would have canceled that affiliation without regard to its purchase of the Bartell station. If so, much, if not all, of petitioner's alleged loss would have been incurred because of this unilateral act, and not "by reason of anything forbidden in the antitrust laws."

that the depositions and affidavits which were before the District Court disclosed to a practical certainty that such proof could not be made.

What did remain open to proof was an alleged arrangement among CBS, its television division, and its officers and agents whereby CBS canceled an affiliation with one UHF station and purchased the facilities of a competing station. Even if somewhere among those sought to be drawn into petitioner's net there can be found two independent actors whose meeting of minds would satisfy the usual conspiracy requirement of "plurality of parties,"[4] their agreement to carry out that design would not, in my view, of itself offend anything poscribed by §§ 1 or 2 of the Sherman Act.

I.

In passing on the motion for summary judgment, the District Court had before it more than the four affidavits of interested parties to which the Court's opinion seems especially to refer (*ante*, pp. 4, 9). In the record was the testimony of four key witnesses taken by pretrial depositions. Petitioner's counsel had examined Frank Stanton, President of CBS; Richard Salant, a Vice-President of CBS; and Thad Holt, who acted for CBS in procuring the option on the Bartell station.[5] Petitioner's testimony was also in the record in the form of a deposition taken

[4] While I do not reach respondents' contention that no consensual arrangement of any kind was shown, I must say that the Court has stretched very far in suggesting that Holt may have been a "conspirator." The record shows, beyond any real possibility of contradiction, that Holt was simply engaged by CBS to act for it, as undisclosed principal, in procuring from Bartell an option to purchase WOKY. So far as Bartell is concerned, it stands uncontroverted in the record that he never knew of CBS' interest in Holt's option until it was exercised by CBS.

[5] The record shows that the undisclosed employment of Holt was due to CBS' desire to keep its competitors, particularly the National Broadcasting Company, from knowledge of its intentions respecting WOKY. This is, of course, a perfectly normal business phenomenon.

by respondent's counsel, and two affidavits submitted in opposition to the motion for summary judgment. In addition, the record contained the respondents' answers to written interrogatories put by the petitioner. It is in light of this far from meager pretrial discovery that the appropriateness of summary judgment must be evaluated.

Federal Rule of Civil Procedure 56 (c) authorizes a District Court to enter summary judgment

> "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In so providing, the draftsmen of the Rule of course did not intend to cut off a litigant's right to a trial before the appropriate fact-finder if triable issues remained unresolved after the pleadings were closed and pretrial discovery had. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627; *Fountain* v. *Filson*, 336 U. S. 681. On the other hand, it is equally clear that their purpose was to obviate trials which would serve no useful purpose. In administering the Rule, the availability of pretrial discovery, as well as matter actually discovered, is a factor to be considered in determining whether a "genuine issue as to any material fact" is open. *E. g., Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831. Further, the Rule does not indicate that it is to be used any more "sparingly" in antitrust litigation (*ante*, p. 9) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others. On the contrary, without reflecting in any way upon the good faith of this particular lawsuit, having regard to the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is

good reason for giving the summary judgment rule its full legitimate sweep in this field.

In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits.[6] Neither his cross-examination of hostile witnesses nor his own direct testimony by way of deposition and affidavit produced any evidence which would indicate that the respondents sought to accomplish anything more than to purchase for CBS a UHF station in Milwaukee. As the Court's opinion seems to recognize, such a purchase (accompanied by a cancellation of petitioner's station affiliation) would be unlawful only if "*conceived in a purpose* to unreasonably restrain trade, control a market, or monopolize." (*Ante*, p. 5.) (Emphasis added.) In other words, unless a purpose to cancel petitioner's affiliation and purchase the Bartell station would, by itself, be unlawful, petitioner could prevail in this suit only if he proved that the respondents *intended* to stifle competition in, or monopolize, television broadcasting, either by closing down his station or, more broadly, by destroying the UHF business in whole or in part.[7]

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[6] There is no suggestion that petitioner was not afforded opportunity to examine any witness he wanted, either before or after respondents made their motion for summary judgment.

[7] The assertion that respondents sought to destroy "the UHF industry . . . because of the enormous economic investment they had in VHF," upon which the Court relies (*ante*, p. 5), was not made in any of the papers filed with the District Court. It was first raised during oral argument on the motion for summary judgment. There is nothing in the record to support this charge except the hindsight inference arising from the fact that after *four* years of operating the UHF station in Milwaukee, CBS discontinued it, claiming that the VHF competition was too powerful.

The Court's opinion takes out of context certain statements in a CBS report and infers from them that CBS was intending to make only a short-term venture out of its UHF purchase. But a full

This crucial issue, therefore, turns on proof of the respondents' motives. Had petitioner proceeded to trial and introduced no more evidence of motive than was revealed by the pretrial depositions and affidavits, the case, in my opinion, could not well have been permitted to go to the jury. There being no extrinsic evidence of an unlawful purpose, and CBS' executives having unequivocally denied any purpose to eliminate petitioner as a competitor, the jury would be left with no affirmative evidence of any intent to restrain trade. The possibility that the jury might disbelieve the respondents' assertions of innocence is not enough to forestall the entry of summary judgment in their favor. *Dyer* v. *McDougall*, 201 F. 2d 265.

Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or

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reading of the report in question, which was appended to petitioner's affidavit in opposition to the motion for summary judgment, reveals that CBS rejected the suggestion that it purchase a UHF station in a market that was primarily VHF, for the very reason that it would have only short-term advantages. Moreover, the Court's construction of the passage on which it relies hardly reflects its real meaning. The central question on which the report focused was "the degree of short-term cost and inconvenience that is to be undergone in order to obtain the eventual gain" in the purchase of a UHF station. In this context, the report noted that CBS television programs, broadcast by a CBS affiliate in the area (*i. e.*, WCAN), had already built up a UHF viewing market, so that the losses that might be expected at the outset of any such venture would be minimized. The inference is that it would be wise for CBS to capitalize on this headstart before it was cut into by more VHF stations, not that CBS should purchase the station and abandon it as soon as other VHF stations entered the market.

that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles. See *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715; *Schneider* v. *McKesson & Robbins, Inc.*, *supra*; cf. *Orvis* v. *Brickman*, 196 F. 2d 762, 765–766; *Lavine* v. *Shapiro*, 257 F. 2d 14, 20–21.

II.

I find nothing in this record to support a claim that CBS, in proceeding as it did, was actuated by a desire to restrain or monopolize trade.

It appears from questions asked of Stanton and Salant, two CBS officers, that petitioner sought to imply an unlawful motive to destroy competition from CBS' failure to negotiate with him in the first instance for the purchase of WCAN. Were it shown that respondents refused to consider purchasing petitioner's instead of Bartell's station, although the former was available on satisfactory terms, such a showing might be some evidence of an intent to eliminate petitioner as a competitor of the other station bought by CBS. But the record shows that respondents throughout insisted that their refusal to deal with petitioner was the result of information that he had placed an exorbitant price on his station. That insistence, which Poller did not controvert or himself impugn, is confirmed by his own computation of damages in this case, as well as by his deposition testimony which reveals that he valued the WCAN property at $2,000,000 and demanded that price of all interested purchasers. CBS bought the Bartell station, although to be sure it had substantially inferior facilities, for $335,000.

Nor is there any evidence in the record to indicate that the respondents anticipated petitioner's offer to sell his facilities to CBS. It is clear from the affidavits and depositions, and is, in fact, conceded in petitioner's brief before this Court, that it was petitioner who initiated the negotiations and "importuned CBS to take his

equipment off his hands." Petitioner contends that the respondents knew he would have no use for the recently enlarged plant once his CBS affiliation was canceled, so that his offer of sale was a necessary consequence of the disaffiliation. But this proves only that petitioner's injury may as readily have been the result of CBS' lawful program of expansion as of an invidious scheme to restrain competition. It buttresses the conclusion reached by the Court of Appeals (284 F. 2d 599, 602, 605) that the diminution in the value of petitioner's property was attributable to petitioner's imprudent investment [8] rather than to any antitrust conspiracy by the respondents. In addition, petitioner's surmise that the respondents must have known that the cancellation of Poller's affiliation would result in his offering his equipment to CBS is hardly consistent with the fact, sworn to by Salant and never traversed, that CBS had its engineering department draw up complete plans as to how the Bartell facilities could be expanded to make them suitable for CBS' intended use.

Finally, it is entirely clear from the record that petitioner was unable to prove that the respondents' motive was to eliminate his station. It is undisputed that at the time Holt obtained the option on the Bartell station both the American Broadcasting and DuMont networks had no primary affiliates in the Milwaukee market. There is nothing to indicate that respondents should have anticipated at the birth of their alleged conspiracy that such affiliations would be unavailable to petitioner if the CBS tie were broken. Moreover, it is patent from the terms

[8] The record shows that Poller from the beginning had unsuccessfully tried to persuade CBS to enlarge the term of his affiliation contract cancellation clause from six months to two years, and that, with eyes thus open, he nonetheless proceeded with his substantial equipment investment.

of the contract under which CBS purchased petitioner's equipment that petitioner represented to the respondents that he would continue broadcasting operations as an independent from the studio formerly occupied by Bartell.[*] It was only after this representation was made, albeit, as petitioner now claims, with only "about a 5 per cent hope" that he would be able to continue, that the exchange of facilities was consummated. The transaction was in all ways consistent with the parties' written intention to maintain *two* operating UHF stations in Milwaukee. For it was surely much more likely that petitioner could survive as an independent by using the smaller Bartell plant than by remaining in his enlarged studio, which had absorbed a large amount of capital that could not, at least immediately, be put to fruitful use.

In sum, the District Court had before it on this motion for summary judgment a record on which it was apparent that petitioner could prove only that CBS had undertaken to cancel its affiliation with petitioner's station and, with Holt's assistance, to purchase a competing UHF station. Only if such a "conspiracy" is prohibited by §§ 1 or 2 of the Sherman Act should the petitioner have been permitted to proceed to trial.

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[*] One of the introductory clauses of the contract provided:

"WHEREAS, Midwest [petitioner] has represented to CBS that Midwest intends to continue the operation of WCAN and all business incidental thereto, and for that purpose CBS proposes to make the sale and transfers hereinafter set forth; . . ."

I find no persuasive basis in the record for petitioner's assertion that this was designed as a self-serving declaration to cloak CBS' alleged antitrust malefactions. By that same contract CBS sold to Poller the WOKY equipment, in part consideration for the purchase of his equipment, the thought quite evidently being that such equipment would suffice for his continued operations, while the superior WCAN equipment would relieve CBS from the necessity of completely re-equipping WOKY.

III.

Respondents freely admit that the purchase of the Bartell station and the cancellation of petitioner's affiliation were parts of one course of action. They maintain, however, that their intention was to purchase a UHF station in Milwaukee as the first step in an incipient program of expansion into the UHF market, made possible by the Federal Communication Commission's then recently adopted "5-and-2" amendment to its multiple ownership rule. By reason of this amendment, a single licensee was permitted to own two UHF stations in addition to the maximum five VHF stations theretofore allowed. I would hold that an arrangement to attain this objective did not, of itself, violate § 1 of the Sherman Act.

It must be obvious that the cancellation of an affiliation agreement by one network, not acting in concert with any other, does not alone give rise to a cause of action under the antitrust laws. *Federal Broadcasting System, Inc.*, v. *American Broadcasting Co.*, 167 F. 2d 349. A network is surely free to cut its ties to one station and affiliate with another in the same market. Such an act is analogous to a manufacturer's transfer of an exclusive distributorship from one dealer in the market to another. This freedom to choose with whom one deals is preserved under the antitrust laws not only because it is a unilateral decision, but because it does not amount to an unreasonable restraint of trade in any meaningful sense of the term, cf. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534.

To overcome these apparent barriers to any holding that § 1 of the Sherman Act was here violated, petitioner suggests two theories under which respondents' conduct might constitute a forbidden restraint of trade: (1) That by reason of the "leverage of its network power" CBS was

able to restrain trade among the independently owned UHF stations in the Milwaukee area; and (2) that CBS' purchase of a television station amounted, *per se*, to an unreasonable restraint of trade. How either of these alleged restraints, assuming they are unlawful, caused petitioner's alleged loss is left a mystery. Regardless of any question of causation, however, petitioner can prevail on neither theory.

To the extent that the "leverage" complained of charges CBS with monopolizing a market, petitioner's claim falls under § 2, a matter to which I will revert in a moment. *Infra*, pp. 12–13. Apart from monopoly power, the respondents could have violated the antitrust laws only by conspiring in some manner to use CBS' "leverage" to restrain trade. Clearly, the disaffiliation alone was not an unlawful use of the network's power. Having built up the value of his station substantially because of its CBS affiliation, petitioner is hardly in a position to claim that by depriving him, in the exercise of a contract right, of the benefit of such an affiliation CBS was unreasonably exercising its superior power to restrain trade. And there is no indication in the record that this "leverage" in any way affected the purchase price of petitioner's equipment, even were it to be assumed that the respondents foresaw that petitioner would be willing to sell. The charges here are unlike those in *United States* v. *Radio Corporation of America*, 158 F. Supp. 333, reversed, 358 U. S. 334, in which the Government sought to enjoin, as violating § 1, a network's attempt to coerce an independent owner into selling his station to the network under threat of canceling the network's affiliation with other stations under the same ownership. In this case there is no claim made that CBS conditioned the continuation of some network service upon petitioner's consent to sell his equipment, or on his willingness to reduce his price.

Nor can I agree that the contract whereby CBS became a station owner in the Milwaukee market was, in and of itself, a contract in restraint of trade. Petitioner is unable to point to any convincing differences between the vertical integration that is accomplished when a network purchases a station and that which results from an affiliation contract. Moreover, the very contention now being made here by the petitioner has repeatedly been presented to the Federal Communications Commission, and that agency has consistently adhered to the view that network ownership of stations, subject, of course, to the maximum-ownership limitation, is not contrary to the public interest. *E. g., ABC–Paramount Merger*, 8 Pike & Fischer R. R. 541; *St. Louis Telecast, Inc.*, 12 Pike & Fischer R. R. 1289, 1372; *National Broadcasting Co.*, 20 Pike & Fischer R. R. 411, 419.

This Court has also been reluctant to hold that vertical expansion alone can amount to an unreasonable restraint prohibited by § 1 of the Sherman Act. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173–174; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525. Without of course suggesting that the Federal Communications Commission has authority to alleviate an applicant for a station license from the requirements of the antitrust laws, *United States* v *Radio Corporation of America*, 358 U. S. 334, in light of the uniform course of decisions by the agency familiar with the field, and in the absence of any indication that this particular purchase *in fact* restrained trade, I think it is clear that petitioner's injury, even if it be assumed partially attributable to CBS' purchase, may not be made the basis of a treble-damage action.

Petitioner's § 2 claim is if anything even more insubstantial. He contends that respondents conspired to monopolize the UHF market in Milwaukee, and perhaps across the country, and that they succeeded in their attempt, at least in Milwaukee. But it is undisputed that

the television sets being produced and sold in the Milwaukee area at the time of the alleged conspiracy were all equipped to receive VHF broadcasts and could be adapted to receive UHF signals as well. Thus, any UHF station was necessarily in competition with all VHF stations in the market with respect to both the viewing and the advertising public. Indeed, as the record uncontrovertedly shows, the CBS station ultimately succumbed because the VHF competition was too strong. Since CBS was patently not a monopolist in the Milwaukee market (which included both UHF and VHF), and since there was no allegation that it approached monopoly power in any other market in which petitioner was a competitor, the entry of summary judgment in favor of the respondents on this claim too was eminently correct.

I have gone into this matter at some length because in my opinion the Court's encouragement of this sort of antitrust "enforcement" does disservice to the healthy observance of these laws. I would affirm.